(5)

No. 91-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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April 1992

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QUESTION PRESENTED

Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The Fifth Circuit's first opinion directed the award of nominal damages to petitioners. *Farrar v. Cain*, 756 F.2d 1148 (5 Cir. 1985) (Pet. App. 2). On remand, the district court awarded attorney's fees to petitioners in an unreported memorandum and order (Pet. App. 12, 13, 29).

The Fifth Circuit's second opinion reversed, concluding that plaintiffs who recover nominal damages for federal civil rights violations are not "prevailing parties," and therefore are not entitled to attorney's fees under 42 U.S.C. § 1988, because they have gained only "a *de minimis* or technical victory." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5 Cir. 1991) (Pet. App. 30).

JURISDICTION

The opinion and judgment of the court of appeals were entered on September 17, 1991 (Pet. App. 30, 46). The petition for certiorari was filed within 90 days thereafter and was timely. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended (Pet. App. 47).

STATEMENT OF THE CASE

Joseph Farrar and his son Dale sued Respondent William P. Hobby, then Lieutenant Governor of Texas, and other public officials under 42 U.S.C. § 1983.[1] They alleged, among other claims, that the defendants violated their right to procedural due process of law by illegally closing a school they operated in Liberty County, Texas. The jury returned a verdict finding that Hobby violated Joseph Farrar's federal due process

[1] Joseph Farrar died before trial. Petitioners, as co-administrators of his estate, were ordered substituted as plaintiffs under F.R.Civ.P. 25(a) (Pet. App. 1).

rights under color of state law, but awarded no damages for that violation (Special Interrogatories 7 and 8, Brief in Opposition at A-3). The district court entered a take-nothing judgment on the jury's verdict.

Relying on *Carey v. Piphus*, 435 U.S. 247 (1978), the Fifth Circuit reversed:

> Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages. We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[2] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

Farrar v. Cain, 756 F.2d 1148, 1152 (5 Cir. 1985) (footnotes and citations omitted) (Pet. App. 10).

On remand, petitioners filed an application for attorney's fees under 42 U.S.C. § 1988. Following a lengthy hearing, the district court awarded to them

[2] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5 Cir. 1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5 Cir. 1984), *aff'd in part and rev'd in part*, 739 F.2d 993 (5 Cir. 1984).

against Hobby $280,000.00 in attorney's fees, $27,932.00 in costs and expenses, and prejudgment interest on the expenses (Pet. App. 12).

Hobby appealed. A different panel of the Fifth Circuit, one judge dissenting, reversed the fee award, holding that petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988. The Fifth Circuit acknowledged that "[o]ur holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits." 941 F.2d at 1316 (Pet. App. 41). It conceded the principle, established by *Carey v. Piphus*, 435 U.S. 247 (1978), that "[a] violation of constitutional rights is never *de minimis*," because it is never "so small or trifling that the law takes no account of it." 941 F.2d at 1315, quoting *Lewis v. Woods*, 848 F.2d 649, 651 (5 Cir. 1988) (Pet. App. 40).

Nonetheless, without citing or mentioning *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the panel majority interpreted *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988) collectively to mean that a civil rights plaintiff recovering nominal damages has attained only a *de minimis* or technical victory, and therefore is not a "prevailing party" under § 1988. 941 F.2d at 1316 (Pet. App. 41). The majority reasoned that a plaintiff "prevails" within the meaning of § 1988 only when the final decision "secures some of the relief sought by the plaintiff in bringing the suit." 941 F.2d at 1317 (Pet. App. 45). Concluding that "the recovery of one dollar is no victory under § 1988," the majority held that "the plaintiff's victory, *as measured by the*

success actually obtained, was merely a *de minimis* or technical success." 941 F.2d at 1315-16 (footnote omitted; emphasis added) (Pet. App. 40-41).[3]

Petitioners did not seek panel rehearing or suggest rehearing en banc. Because its decision created an intercircuit conflict, the Fifth Circuit "circulated the opinion to the entire court as required by the court's policy. No member of the court has requested en banc consideration." 941 F.2d at 1316 n. 22 (Pet. App. 41).

SUMMARY OF THE ARGUMENT

1. The petitioners won this litigation. Hobby lost. The nominal damages awarded "change[d] the legal relationship" that existed between Hobby and the petitioners before the trial began, *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and constituted "at least some relief on the merits of [petitioners'] claim. . ." *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

A plaintiff who obtains a jury verdict that his federal constitutional rights have been violated, and who thereby is entitled at least to nominal damages, *Carey v. Piphus*, 435 U.S. 247 (1978), cannot rationally be characterized as a *losing* party, no more than the defendant who lost the verdict and judgment can be declared the winner. Such plaintiffs "prevail" within the meaning of § 1988 by establishing important legal or constitutional principles that are wholly independent of the amount of money at stake. That

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[3] The panel did not consider or decide Hobby's alternative contention that the amount of the attorney's fees awarded was not "reasonable," in the sense demanded by § 1988. That question therefore is not before this Court.

result is significant because it deters similar violations by other public officials or governmental entities, and encourages counsel who contemplate prosecuting or defending civil rights litigation to evaluate the probabilities of success in terms of the constitutional principle at stake, rather than the amount of money at issue. Congress intended precisely that result.

This Court's previous decisions, and those of virtually all other federal courts of appeals, strongly reinforce the view that the amount of a civil rights damages award is relevant only to an assessment of the reasonableness of attorney's fees awarded under § 1988. It does not and cannot determine whether such fees are recoverable at all. *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 792-93 (1989). Congress has rejected a rigid rule of proportionality between damages awarded and attorney's fees recoverable. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). This principle, and the Court's insistence that all violations of federal rights must be compensable in *some* amount, *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978), establish that nominal damages awards necessarily must support recovery of attorney's fees in *some* amount under § 1988.

The purposes served historically by an award of nominal damages are consistent with the policies underlying § 1988's authorization of reasonable attorney's fees. Nominal damages awards vindicate principle by affirming that one party has been wronged by another. They establish benchmark standards of appropriate and acceptable behavior, stigmatize unlawful misconduct, and encourage peaceful settlement of grievances by resort to the judicial

process. Awards of nominal damages serve as a powerful incentive to meritorious litigation in which the injuries sustained are not or may not be compensable in money. In the same sense, awards of attorney's fees under § 1988 encourage litigation in which the probability of establishing a violation of federal rights may be substantial, but the possibility of recovering significant monetary relief may be remote or nonexistent. Again, Congress contemplated precisely that outcome.

2. Congress meant for nominal damages to support the award of reasonable attorney's fees. The legislative history of the 1976 amendment to § 1988 confirms that view.

Congress wanted to deter violations of federal rights by assuring that officials who disregard the nation's fundamental laws could not do so with impunity. Rights that are non-pecuniary in nature are as deserving of protection as those whose infringement results in significant money damages. Section 1988 assures that those who despoil the Constitution will pay the full social cost of their misconduct, which includes making victims whole for the costs of obtaining relief. Congress also envisioned a return to pre-*Alyeska* practice, which routinely included recovery of attorney's fees in nominal damages cases. Finally, Congress intended that victims of civil rights abuses should receive the same protection afforded to victims of anti-trust violations, which includes payment of their attorney's fees when only nominal damages are awarded.

3. Nominal damages awards traditionally have supported the award of costs to prevailing plaintiffs,

both at common law and in state and federal courts. Attorney's fees recoverable under § 1988 are deemed by Congress and this Court to constitute "costs." They should therefor be subject to the same principles that historically have governed awards of all other costs.

ARGUMENT

1. The petitioners "prevailed," in the sense intended by Congress in § 1988, by winning a jury verdict that entitles them to nominal damages.

Congress has provided in § 1988 that in civil rights cases the district court, in its discretion, "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Plaintiffs "prevail" for purposes of the statute by succeeding on "any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1 Cir. 1978).

Hobby escaped having to pay large damages for the violation of federal rights he inflicted, but he did not win the case. The petitioners obtained a specific jury finding that Hobby violated Joseph Farrar's federal civil rights while acting under color of state law. That verdict entitled them to a judgment for at least nominal damages. *Carey v. Piphus*, 435 U.S. 427 (1978). The Farrars succeeded on significant issues in the litigation that were unrelated to money. As the district court held in its memorandum on attorney's fees (Pet. App. A-18, 22, 28):

> A constitutional violation by a public official is no less repugnant to our system simply because the injury is not redressable by money damages. . . Requesting money damages in a civil rights suit is a means to an end; that the substantial damages that are requested are not ultimately awarded does not mean that important constitutional rights have not been vindicated. . . [T]hat the plaintiffs can trace no revolution in public administration by reason of this case does not diminish the contribution that is made by people who force public officials to comply with the law. It is not just the family name of the Farrars and the protection of the Farrars from an excessive government that has been accomplished here. The protection extends to all Americans.
>
> In short, the Farrars won. Hobby lost.

It would be anomalous to maintain that a defendant against whom nominal damages have been awarded is a "prevailing party."[4] The court-imposed obligation on

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[4] Self-evidently Hobby is not the prevailing party in this litigation. Having lost both the jury verdict and the appeal that authorized the award of nominal damages against him, he could not now plausibly assert entitlement to recover witness and filing fees, deposition costs, and related expenses of litigation from the plaintiffs under 28 U.S.C. §§ 1821 and 1920 and F.R.Civ.P. 54(d). *Cf. Quarles v. Oxford Municipal Separate School Dist.*, 868 F.2d 750, 758 (5 Cir. 1989) (Rule 54(d) does not authorize award of costs to non-prevailing party).

Likewise, Hobby cannot resist payment of the nominal damages assessed simply by claiming that the amount is too

Hobby to pay such damages "change[d] the legal relationship" that existed between the petitioners and him before the trial began, *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and constituted "at least some relief on the merits of [petitioners'] claim. . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

Civil rights plaintiffs "prevail" under § 1988 when they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit . . . sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). A judgment awarding even nominal damages reflects "the importance to organized society that [constitutional] rights be scrupulously observed. . ." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The actual injury and the amount awarded may be trivial or insignificant. The principle at stake is not.

The district court based its award of attorney's fees on the decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). The Fifth Circuit's opinion does not discuss or cite that case. There a plurality of the Court "[rejected] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers," 477 U.S. at 574-76, "because damages awards do not reflect fully the public benefit advanced by civil rights litigation . . . Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money

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trivial to be of concern to him. The fact that the amount of a legally enforceable debt is insignificant does not mean it is not owed.

damages." *Id.* at 575, 576. Justice Powell joined that conclusion in a concurring opinion. 477 U.S. at 581, 585: "Neither the decisions of this Court nor the legislative history of § 1988 support [a rule of proportionality]."

The Court in *Rivera* repudiated the idea that entitlement to reasonable attorney's fees under § 1988 is necessarily contingent upon the amount of damages awarded, or that attorney's fees can be denied altogether simply because the compensable constitutional injury may seem slight. "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988." 477 U.S. at 578.

The understanding that limited damages recoveries would not defeat entitlement to fees altogether was underscored in *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989). There the Court explained that "the degree of the plaintiff's success . . . is a factor critical to the determination of the *size* of a reasonable fee, not to *eligibility* for a fee award at all." 489 U.S. at 789 (emphasis added). The Fifth Circuit simply ignored *Garland*'s square holding that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in [§ 1988]. Where such a change has occurred, the *degree* of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, *not to the availability of a fee award vel non.*" 489

U.S. at 792-93 (emphasis added); *Hensley v. Eckerhart*, 461 U.S. at 430 ("the level of a plaintiff's success is relevant to the amount of fees to be awarded").

The jury verdict in petitioners' favor, and the resulting judgment for nominal damages to which it entitled them, obviously "changed the legal relationship of the parties." A "material alteration of the legal relationship of the parties" does not mean "a material change in the *financial* relationship of the parties." The jury determined that Hobby was a constitutional tortfeasor and had violated Dr. Farrar's right to due process of law under the Constitution of the United States. As the district court's memorandum opinion makes clear, that was the real victory in this case, and its importance is not diminished by the fact that only nominal damages were awarded or that petitioners could not prove greater damages to the jury's satisfaction.

The Fifth Circuit majority believed that an award of nominal damages neither "change[s] the legal relationship" between the parties, nor "secures some of the relief sought by the plaintiff in bringing the suit," 941 F.2d at 1317 (Pet. App. 45), but instead constitutes "merely a *de minimis* or technical success." 941 F.2d at 1316 (Pet. App. 41). The decisions on which the Fifth Circuit relied, *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1 (1988) and *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), do not support that conclusion.

In *Hewitt* the plaintiff obtained only "a favorable judicial statement of the law in the course of litigation that [resulted] in judgment *against the plaintiff*," who

otherwise "obtained no relief." 482 U.S. at 760, 763 (emphasis added). Here judgment was for the petitioners, not Hobby. In *Rhodes* "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." 488 U.S. at 4. Here the plaintiffs are entitled to judgment, and the case is not moot. Petitioners "secured some of the relief sought" — a favorable judgment for damages based on a jury finding supporting their constitutional claim. In light of *City of Riverside v. Rivera*, *Carey v. Piphus*, and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11 (1986), an award of nominal damages cannot plausibly be characterized as "no relief whatsoever."

The Court suggested *in Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 792 (1989) that attorney's fees might be denied "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*." *Garland* cites as an example of "technical or *de minimis*" success the trial court's ruling in that case that a school district policy was unconstitutionally vague, even though there was no evidence it had ever been applied to the plaintiffs. Petitioners attained far more than such a meaningless, non-compensable victory. Here the jury's verdict explicitly found that "Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States . . ."

Neither Congress nor this Court has ever implied that an actual deprivation of a federal right is unworthy of redress, as opposed to a potential, theoretical infringement that has never occurred, that may never

materialize, and that would not support a nominal damages award in any event. Characterizing as "purely technical or *de minimis*" a civil rights plaintiff's success in obtaining nominal damages for an acknowledged violation of the constitutional right to due process of law is incompatible with this Court's characterization of that right as "central to our system of ordered liberty." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986). It is irreconcilable with *Rivera*'s central premise that recovery of attorney's fees in federal civil rights cases is not dependent upon "obtaining substantial monetary relief." It is, finally, fundamentally inconsistent with this Court's insistence in *Carey v. Piphus* that a nominal damages award is not some arcane ceremonial formality but an indispensable recognition of the fact that organized society demands "scrupulous" observance of federal rights by government officials. 435 U.S. at 266. In this country, at least, there are no *de minimis* constitutional deprivations.

The Fifth Circuit never reached or even intimated its position on the question of whether the attorney's fees awarded by the district court were "reasonable," in the sense demanded by § 1988. It did not decide whether the award should have been modified or reduced. Instead, it imposed an absolute bar to the recovery of *any* attorney's fees, in *any* amount, by *any* plaintiff awarded only nominal damages, in *any* federal civil rights case in *any* United States district court within the Fifth Circuit.

In essence, the Fifth Circuit has reverted to its pre-*Garland* posture by making the test for entitlement to attorney's fees in that circuit dependent upon a judge's

assessment of the subjective motivation of the parties in bringing the lawsuit. If Farrar had sought only nominal damages from the outset, rather than asking for $17 million, presumably he would have been entitled to attorney's fees under the Fifth Circuit's approach, because he would have obtained all the relief he sought. It is apparently only because petitioners asked the jury to award substantial monetary damages, and did not recover them, that the Fifth Circuit concludes they have forfeited their right to obtain any attorney's fees at all.[5]

Such a rule, turning on a determination of a civil rights plaintiff's real, true, or predominant objective in bringing suit, is squarely at odds with *Garland*. There the Court condemned "creating such an unstable threshold to fee eligibility" as "wholly irrelevant to the purposes behind the fee shifting provisions" of § 1988. 489 U.S. at 791. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). It is not simply to obtain large amounts of money for people whose federal rights have been violated. Accomplishing the congressional objective thus is not determined by the damages a jury awards:

> [A]n undesirable emphasis [should not] be placed on the importance of recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil

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[5] The Fifth Circuit's decision denies not only attorney's fees but all other costs as well. Thus, under that holding, a plaintiff recovering only nominal damages is likewise disentitled to recover expenses of litigation under 28 U.S.C. §§ 1821 and 1920.

> rights litigation, not to create a special incentive to prove damages . . . Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the actions seeks monetary damages.

Blanchard v. Bergeron, 489 U.S. 87, 95-96 (1989).

Federal courts of appeals consistently have held that judgments for nominal damages are sufficient to support reasonable attorney's fees awards under § 1988.[6] Indeed, this Court said as much in footnote 11 of *Carey v. Piphus*: "We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional — and by no means inconsequential — assurance that agents of the State

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[6] *Romberg v. Nichols*, 953 F.2d 1152 (9 Cir. 1992); *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2 Cir. 1991); *Smith v. DeBartoli*, 769 F.2d 451, 453 (7 Cir. 1985) (dictum), *cert. denied* 475 U.S. 1067 (1986); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8 Cir. 1988); *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9 Cir. 1988); *Nephew v. City of Aurora*, 830 F.2d 1547 (10 Cir. 1987) (en banc), *cert. denied* 485 U.S. 976 (1988); *Garner v. Wal-Mart Stores; Inc.*, 807 F.2d 1536, 1539 (11 Cir. 1987); see also *Burt v. Abel*, 585 F.2d 613, 617-18 (4 Cir. 1978); *Tedesco v. City of Stamford*, 24 Conn.App. 377, 588 A.2d 656, 659 (1991) (dictum); *but see Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4 Cir. 1990) (dictum); *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985), *cert. denied* 474 U.S. 989 (1985) (Justice White dissenting).

will not deliberately ignore due process rights [even though their violation may lead only to nominal damages]." 435 U.S. at 257.

Moreover, in *City of Riverside v. Rivera*, 477 U.S. at 576 n. 8, the plurality cited with approval several lower court cases in which attorney's fees had been awarded following assessment of nominal damages: *McCann v. Coughlin*, 698 F.2d 112, 128-29 (2 Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5 Cir. 1982); and *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1 Cir. 1979). Indeed, the Fifth Circuit itself frequently approved fee awards in nominal damages cases both before and after *Texas State Teachers Ass'n v. Garland Ind. School Dist.* See *Basiardanes v. City of Galveston*, *supra*; *Ryland v. Shapiro*, 708 F.2d 967, 976 (5 Cir. 1983); *Fyfe v. Curlee*, 902 F.2d 401, 406 (5 Cir. 1990); *cf. Cobb v. Miller*, 818 F.2d 1227, 1233 (5 Cir. 1987) (refusing to permit reduction of fees because plaintiff recovered only "comparatively nominal damages").

Thus, even after *Garland*, the Fifth Circuit had explicitly rejected the proposition that nominal damages awards represent only *de minimis* success on the merits of federal civil rights claims. The rationale of these cases was articulated in *Harkless v. Sweeny Ind. School Dist.*, 466 F. Supp. 457, 473 (S.D. Tex. 1979), *aff'd* 608 F.2d 594 (5 Cir. 1979):

> Even if each of the plaintiffs had within a very short period of time obtained a better paying job and the back pay was thus nominal, the vindication of principles for which these plaintiffs and their attorneys struggled would have been extremely important. The plaintiffs

and their counsel were struggling in this case not for a few dollars in back pay, but for vindication of their right to equal treatment. Plaintiffs' self-esteem and professional reputations were in issue — not just dollars.

* * *

From the stand-point of the plaintiffs, it can accurately be stated that the fact of recovery, and the fact that their right to equal treatment has been judicially vindicated, are much more significant than the amount of recovery. Accordingly, in the court's judgment, this is not a case in which the value of counsel's services or their compensation may be fixed by an arbitrary or an adjusted percentage of the recovery effected for the plaintiffs.[7]

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[7] In affirming *Harkless*, the Fifth Circuit observed that

> the plaintiffs not only recovered back pay, which was minimal since most were able to quickly secure new employment, but also had the satisfaction of vindicating their professional status, which defendants, to put it mildly, had impugned. . . In any case [§ 1988] provides that a 'prevailing party' should receive attorney's fees when the trial court deems it appropriate, and does not limit those fees to the amount recovered by the plaintiff. The purpose of the Attorney's Fees Awards Act — to encourage private enforcement of the civil rights laws — would be thwarted by [limiting fee awards to a proportion of the total recovery], and no such restriction is suggested by the legislative history of the Act.

608 F.2d at 598 (citations omitted).

Precisely such considerations are presented here. As the district court explained (Pet. App. A-23, 24, 25),

> Hobby cannot belittle the important victory secured by Dale Farrar of clearing his family name . . . [and discouraging] state officials from overstepping the bounds of responsibility entrusted to them. Awarding attorney's fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions. . . [T]he cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by government officers and the expenditure of thousands of taxpayer dollars stubbornly to defend their misconduct. . . The Farrar' suit was not as much a case about money — although this issue was inextricably entwined with the substantive claims — as it was about the legality of the actions of six state officials. . . .

Nominal damages are not a mere ceremonial formality:

> Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. . . [B]ecause of the importance to organized society that procedural due process be observed, . . . the denial of procedural due process [is] actionable for nominal damages without proof of actual injury.

Carey v. Piphus, 435 U.S. 247, 266 (1978).

Nor is it unfair to award reasonable attorney's fees on the basis of a nominal damages recovery simply because of the wholly fortuitous circumstance that the defendant's constitutional violation did not inflict substantial injury on the plaintiff.[8] One of the principal purposes of § 1988 is to vindicate federal rights, wholly apart from the amount of money in controversy or the degree of harm involved. Defendants found to have violated those rights should be accountable for the costs, including reasonable attorney's fees, that would be awarded as a matter of course if the injury inflicted were substantial.

In sum, "[i]n the realm of civil rights, where Congress and the courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make." *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9 Cir. 1992). A civil rights plaintiff who secures such an award has won the case and is a "prevailing party" within the meaning of § 1988.

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[8] F.R.Civ.P. 68 and *Marek v. Chesny*, 473 U.S. 1 (1985) would have permitted Hobby to "have avoided liability for the bulk of the attorney's fees for which [he] now finds [himself] liable by making a reasonable settlement offer in a timely manner." *City of Riverside v. Rivera*, 477 U.S. 580 n. 11. Of course, if Hobby had allowed judgment to be taken against him under Rule 68, even for a dollar, that concession would have constituted a material change in the legal relationship of the parties, entitling the plaintiffs to reasonable attorney's fees incurred before the offer of judgment was made.

2. The language and legislative history of § 1988 evidence a clear congressional purpose to authorize reasonable attorney's fees awards as part of the costs in civil rights cases, even when only nominal damages are recovered.

Congress was acutely aware when it amended § 1988 by enacting the Civil Rights Attorney's Fees Awards Act of 1976 that, in many civil rights cases, the relief at issue is worth less, in monetary terms, than the cost of litigating the claim. H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at p. 9. It has authorized the allowance of sufficient compensation to encourage the litigation of meritorious claims, as a matter of national policy, even if the money damages realistically to be won would not otherwise be sufficient to attract competent counsel or to justify a lawsuit at all:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at p. 2, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at p. 5910.

This Court consistently has recognized and implemented this congressional policy. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in

monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), quoted in *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). "Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley v. Eckerhart*, 461 U.S. 424, 444 n. 4 (1983). A plaintiff in federal civil rights litigation acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and "often secures important societal benefits that are not reflected in nominal or relatively small damage awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).[9] Accordingly, "Congress did not intend for fees in civil rights litigation, unlike those is most private law cases, to depend on obtaining substantial monetary relief." *Id.* at 575.

Moreover, the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 establishes that Congress intended to restore civil rights attorney's fees awards to their status prior to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *See*

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[9] Particularly after *City of Riverside v. Rivera*, Congress has been on notice that attorney's fees in civil rights cases need not be proportional to the amount of damages awarded. It has had a fair opportunity to amend § 1988 but has not done so. Congressional efforts to curtail attorney's fees awards that are disproportionate to the damages recovered consistently have failed. See proposed Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984), S. 1580, 99th Cong., 1st Sess. (1985); S. 133, 102nd Cong., 1st Sess. (1991).

Senate R. No. 94-1011 at p. 4; H.R. No. 94-1558, 94th Cong., 2d Sess. at p. 2. Federal courts prior to *Alyeska* routinely awarded attorney's fees on judgments for nominal damages.[10] It is a fair presumption that

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[10] See, e.g., *Skehan v. Bd. of Trustees*, 501 F.2d 31 (3 Cir. 1974), *vacated* 421 U.S. 983 (1975); *Brito v. Zia Co.*, 478 F.2d 1200 (10 Cir. 1973); *Brotherhood of Railroad Signalmen v. Southern Ry. Co.*, 380 F.2d 59 (4 Cir. 1969); *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4 Cir. 1975); *Berry v. Macon County Bd. of Education*, 380 F. Supp. 1244 (M.D. Ala. 1971); *Hammond v. Housing Authority*, 328 F. Supp. 586, 588 (D. Ore. 1971); *cf. Knight v. Auciello*, 453 F.2d 852 (1 Cir. 1972) (attorney's fees on $500.00 damages); *Hill v. Franklin County Bd. of Education*, 390 F.2d 583 (6 Cir. 1968) (attorney's fees on $286.80 damages); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972) (Truth in Lending Act attorney's fees awarded on "minimum damages" of $100.00).

Hammond v. Housing Authority is particularly significant because it was specifically described in "Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests," Senate Committee on the Judiciary, 93rd Cong., 1st Sess. pt. III, at p. 962 (hereafter, "Legal Fees Report"). The cases compiled in that report were commended in the Senate Report accompanying the Civil Rights Attorney's Fees Awards Act of 1976 for having "remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations." Senate Report at p. 4.

Berry v. Macon County Bd. of Education is also discussed in the Legal Fees Report (p. 937), which informed Congress that attorney's fees had been awarded in that nominal damages case.

Congress amended § 1988 "with this prevailing traditional rule in mind," *Franklin v. Gwinnett County Public Schools*, 503 U.S. ___, 112 S.Ct. 1028, 1036 117 L.Ed.2d 208, 221 (1992), to "stimulate voluntary compliance with the law," *Sable Communications of California v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184, 193 (9 Cir. 1989), and to insure that those who violate the federal civil rights of others pay "the full social costs of their unconstitutional conduct, costs that include litigation as well as the original damages." *Kirchoff v. Flynn*, 786 F.2d 320, 327 (7 Cir. 1986).

Finally, Congress specifically intended that civil rights litigants be treated the same as anti-trust plaintiffs, so far as attorney's fees are concerned. "It is intended that the amount of fee awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases . . ." S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at p. 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at p. 5913. "[C]ivil rights plaintiffs should not be singled out for different or less favorable treatment [than anti-trust litigants enjoy]." H.R. No. 94-1558 at p. 9. *Blum v. Stenson*, 465 U.S. 886, 893 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 4 (1983). See also Remarks of Mr. Seiberling (original congressional sponsor of the Fees Act): "We should give civil rights victims the same protections we give anti-trust victims." H. 12165, 94th Cong., 2d Sess. (1976).

In anti-trust cases nominal damages judgments have uniformly been understood to be a sufficient victory to support an award of attorney's fees. See, e.g., *United States Football League v. National Football League*,

887 F.2d 408 (2 Cir. 1989), *cert. denied* 493 U.S. 1071 (1990) (award of nominal damages of $1 under Clayton Act, trebled to $3, held to support award of attorney's fees of $5,529,247.25 and taxable costs of $62,220.92); *Morning Pioneer, Inc. v. Bismark Tribune Co.*, 493 F.2d 383 (8 Cir. 1974). Congress could not have been unaware of that treatment when it amended § 1988. That is the rule of decision Congress expressly intended to apply in civil rights cases.

Nothing in the legislative history of § 1988, as amended in 1976, indicates a congressional intention to withhold attorney's fees awards from civil rights plaintiffs who recover nominal damages. Rather, the available evidence convincingly demonstrates precisely the opposite purpose.

3. At common law, and in both state and federal civil litigation, plaintiffs awarded nominal damages historically have been deemed "prevailing parties," entitled to recover costs, in the absence of a statute or rule limiting that recovery.

The Court at least twice has held that attorney's fees under § 1988 are "an item of costs." *Hutto v. Finney*, 437 U.S. 678, 697 (1978); *Marek v. Chesny*, 473 U.S. 1, 7-10 (1985); *cf. White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 448-49 (1982) (recognizing that § 1988 provides for awarding attorney's fees "as part of the costs").[11] At common

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[11] "[A]bsent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, . . . such fees are to be included as costs for purposes of [F.R.Civ.P.] 68." *Marek v. Chesny*, 473 U.S. at 9. *Cf.* F.R.Civ.P. 54(d) ("costs shall be allowed as of

law nominal damages awards historically were deemed to support recovery of costs. "In England the rule was early established that the prevailing party in an action for damages should recover costs, and one who recovered nominal damages was a prevailing party in this sense."[12] Moreover, "[a] plaintiff who recovers nominal damages is the 'prevailing party' under modern statutes giving costs to the 'prevailing party'."[13]

Nominal damage awards originally served in substantial measure as "a peg on which to hang costs." *Hutton & Bourbonnais, Inc. v. Cook*, 173 N.C. 496, 92 S.E. 355, 356 (1917). As one well-known 19th century commentator observed:

> The failure to perform a duty or contract is a legal wrong independent of actual damages to a party for whose benefit the performance of such duty or contract is due. The omission to show actual damages, and the inference therefrom that none has been sustained, do not necessarily render the case trivial. The law has regard for the substantial rights of parties, though it may overlook trivial things. When such right is violated, the maxim *de minimis non curat lex* has no application. The court will add nominal damages to the finding of a jury when necessary to such rights, as in the

course to the prevailing party unless the court otherwise directs").

[12] C. McCormick, Handbook on the Law of Damages § 24 at 93 (1935) (footnotes omitted).

[13] *Id.*

> instance to carry costs. So judgment which should have been given for a plaintiff for nominal damages, but was rendered for the defendant, will be reversed, if such damages will entitle the plaintiff to costs . . .

J. G. Sutherland, A Treatise on the Law of Damages at 13-14 (2 ed. 1883).[14]

Early federal decisions likewise recognize that an award of nominal damages supports the assessment of costs. For example, in *Forrest v. Hanson*, 9 Fed. Cas. 456, 458-59 (C.C.D.C. 1802) (No. 4,943), the plaintiff accused the defendant of slandering him by calling him "a liar and a swindler." The jury found for the plaintiff and awarded nominal damages of one cent. Finding that no statute limited recovery of costs in such circumstances, the court held "the plaintiff ought to have his judgment, with full costs."

Similarly, in *Merchant v. Lewis*, 17 Fed. Cas. 37 (C.C.S.D. Ohio 1857) (No. 9,437), an action for patent infringement, the jury returned a verdict for nominal damages of five dollars, and the trial court entered a judgment for that amount, "including full costs." The court rejected the defendant's claim that a judgment for nominal damages did not authorize a judgment for costs:

> The right of the plaintiff to costs follows from a verdict in his favor for any amount of damages, whether nominal or compensatory, . . . A

[14] See also J. Stein, Damages and Recovery § 178 at 349 (1972) ("of course, the verdict for nominal damages carries with it the right to recover costs"); D. Dobbs, Law of Remedies § 3.8 at 193 (1973)

> verdict for damages, whatever may be the amount, implies that the defendant has been a wrong-doer. . . and such a verdict will carry costs. It is not a just inference . . . that because nominal damages are found by the jury, the action is necessarily frivolous or vexatious.

This Court repeatedly has sustained the recovery of costs on a verdict and judgment for nominal damages. See *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Keystone Mnfg. Co. v. Adams*, 151 U.S. 139 (1894); *Dow v. Humbert*, 91 U.S. 294 (1876); *North Missouri R. Co. v. Maguire*, 87 U.S. 46 (1873); *Conard v. Pacific Ins. Co. of New York*, 6 Pet. 262, 282 (1832); *see also Woodrow v. Coleman*, 39 F. Cas. 517 (C.C.D.C. 1804) (No. 17,984) (breach of contract; damages of one cent; court gave judgment "with full costs"). Since attorney's fees under § 1988 are costs, they should likewise be recoverable.

As Professor McCormick has observed, many states have modified this traditional principle by statute or rule, limiting or qualifying the costs recoverable if only nominal damages are awarded.[15] Congress has not done that, but instead has chosen to allow recovery of reasonable attorney's fees whenever a plaintiff, as the "prevailing party," is entitled to recovery of costs.

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[15] C. McCormick, §24 at 94. Of course, Congress quite properly could limit or deny altogether recovery of attorney's fees or any other costs in civil rights cases where only nominal damages are recovered. *Cf. Delaware, L. & W. R. Co. v. Lyne*, 193 F. 984, 985 (3 Cir. 1912). Self-evidently, it has not yet done so. See note 9, *supra*.

It has not restricted by statute the *amount* of attorney's fees or other costs recoverable, but has left that determination to the discretion of federal trial courts, subject to a standard of reasonableness. That circumstance is, and should be, determinative of the issue presented here.

Section 1988 attorney's fees should not be denied on some theory that the award of only nominal damages implies the litigation was frivolous or ill-conceived, or implicates interests too tenuous or insignificant to justify the award of costs the law otherwise would allow. Judge Cardozo long ago answered that argument:

> It is no concern of ours that the controversy at the root of this lawsuit may seem to be trivial. That fact supplies us, indeed, the greater reason why the jury should not have been misled into the belief that justice might therefore be denied to the suitor. To enforce one's rights when they are violated is never a legal wrong, and may be a moral duty. It happens in many instances that the violation passes with no effort to redress it — sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong.

Morningstar v. Lafayette Hotel Co., 211 N.Y. 465, 105 N.E. 656, 657 (1914).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and this case remanded for reconsideration of the remaining issues.

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April 1992

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